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MICHAEL RODAK, JR.,

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-959

JOHN H. YOUNG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINION BELOW

Petitioner, John H. Young, hereby applies for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review the judgment rendered by said court in the above

entitled cause. The opinion of the Court of Appeals herein is appended hereto and designated as Appendix "A" to this petition.

JURISDICTION

The judgment of the Court of Appeals in the instant matter was entered December 6, 1972. A petition for rehearing was not filed by petitioner herein. The jurisdiction of this Honorable Court is invoked pursuant to the provisions of Title 28, United States Code, §1254(1). Compliance with the time limitations of Rule 22(2), United States Supreme Court Rules, has been had.

REASONS FOR HEARING

A hearing is respectfully requested in the instant case for the following reasons:

1. The decision of the Court of Appeals below is contrary to the rationale and nature of the holding of this Court in the case of Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L.Ed.2d 446 (1970),

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and a decision by this Court is thus needed herein to reconcile said cases.

2. The decision of the Court of Appeals below serves to deprive petitioner of the effective representation of trial counsel contrary to the mandate of this Court in those cases decided under the Sixth Amendment to the United States Constitution commencing with Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L.Ed. 158 (1932), including Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963), and culminating in Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006 (1972), and a decision by this Court is thus needed herein to accord petitioner the protection of said cases.

3. The decision of the Court of Appeals below ignores the need of trial preparation by the defense in a criminal action and permits the government to seek to prevail by eleventh-hour revelation of theretofore concealed witnesses and evidence without reasonable continuance allowed the defense to meet the same, and a decision by this Court is thus needed herein to establish the fundamental unfairness of

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such proceeding in the present cause and in similar actions that may arise in the future.

4. A decision by this Court is needed herein to determine standards of trial procedure basically fair to both the government and the accused in a criminal action and to prevent arbitrary consideration given to the reasonable needs of each in cases hereafter to be brought to trial.

STATEMENT OF CASE

The present case concerns charges of narcotics smuggling and activities related thereto. Critical to an understanding of the issues herein raised is an account of the procedural background and substantive facts of the case. The same are accordingly summarized following.

PROCEDURAL BACKGROUND

A four count indictment was filed June 2, 1971 in the United States District Court

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for the Southern District of California jointly charging petitioner John H. Young and co-defendants Grady Roger McLeod, Edward F. Barnett, Avell C. Williams, and Kenneth Jefferson in count one with conspiracy to illegally import hereoin and cocaine into the United States in violation of Title 21, United States Code, §§952, 960 and 963; in count two with the unlawful importation into the United States of such narcotics in violation of the same code provisions; in count three with conspiracy to illegally possess heroin and cocaine with intent to distribute the same in violation of Title 21, United States Code, §§ 841(a)(1) and 846; and in count four with the unlawful possession of such narcotics with intent to distribute the same in violation of the same code provisions; each offense, allegedly occurring on or about May 22, 1971 (C.T. pp. 1-5).

Petitioner was arraigned on the above charges June 10, 1971, and an omnibus hearing was set for him on June 17, 1971. At such hearing, inter alia, petitioner's motion for discovery of the names and statements of the government's witnesses was

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granted. The matter was then transferred to a trial department wherein on July 6, 1971 petitioner (and each co-defendant) entered a plea of not guilty to all charges in the indictment, and the case was thereupon continued for hearing of defense motions and for further proceedings (C.T. pp. 8, 14-18, 19, 26).

Motions by petitioner and the several co-defendants to suppress evidence, to sever the trial of the case, to strike two counts of the indictment, for a bill of particulars, and for discovery of evidence, including the names and statements of government witnesses as previously ordered at the omnibus hearing, were thereafter made and the same opposed by the government (C.T. pp. 27-29). Respecting said motions, the same were on October 5, 1971 each denied except for the motion for a bill of particulars, which the government complied with by furnishing the parties with the report of the Los Angeles Police Department concerning the case (C.T. pp. 80-87). In particular, the motion to compel witness disclosure as ordered at the omnibus hearing was denied (R.T. p. 199).

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Trial of the action against petitioner and the co-defendants was then calendared for November 16, 1971 (C.T. pp. 80-80 L).

On November 15, 1971 petitioner moved for a continuance of his trial on the ground that he had become able to retain private counsel and wished to substitute such privately retained and chosen counsel, who was not then able to proceed to trial on the calendared date, for his court appointed counsel who had theretofore represented him. This motion was denied by the trial court which insisted that the trial of the case as to all parties proceed as scheduled on November 16, 1971 (C.T. p. 90; R.T. pp. 202-210). Likewise denied on such date was a renewal of the motion for disclosure of government witnesses in accordance with the omnibus hearing order made earlier in the case (R.T. pp. 210-211).

On November 16, 1971 the case was called for trial, at which time it was first revealed by the government that it intended to call as a prosecution witness Kenneth Jefferson, one of the indicted co-defendants, whose case was thereupon severed from that of petitioner and the

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remaining co-defendants for purposes of trial. Notwithstanding such development, proceedings as to the remaining parties, including petitioner, were ordered to commence immediately, and jury selection in the matter thereupon was had (R.T. pp. 220-222). A jury trial ensued and concluded November 18, 1971 with verdicts of guilty returned by the jury against petitioner and the remaining co-defendants as to each count charged in the indictment (C.T. pp. 108-110, 134-136). Proceedings respecting motions for new trial were noticed by the parties (C.T. pp. 137-159, 160-165), and said motions thereafter denied by the trial court (R.T. pp. 524-526). Judgment was then, on December 20, 1971, imposed on petitioner, and he was sentenced to prison for a term of eight (8) years as to each of the counts on which he was convicted, said terms being ordered to run concurrently (C.T. p. 166).

A notice of appeal was timely filed on petitioner's behalf (C.T. p. 169). Bail on appeal was set by the trial court and posted by petitioner (C.T. p. 187), who is presently at liberty on such bail pending

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determination of the within matter. The appeal was, as heretofore noted, determined adversely to petitioner who now seeks a hearing before this Court for the reasons hereinabove presented.

SUBSTANTIVE FACTS

The facts of the case at bar fall into two categories: those witnessed and testified to by law enforcement officers, and those elicited in the testimony of Kenneth Jefferson, the co-defendant whose trial was severed on the date of trial and who appeared as a government witness against the remaining parties. The combined testimony of the officers and Jefferson amply supports petitioner's conviction, and no contention is made herein regarding the sufficiency of such evidence to support the judgment. Conversely, however, the singular testimony of the officers is totally circumstantial on the issue of petitioner's guilt of the charged offenses and absent the corroborative support of Jefferson's testimony does not unequivocally

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establish such guilt. The importance of Jefferson to the government's case is thus manifest, and equally manifest therefore was the need of the defense to prepare adequately for such testimony and not to be taken by surprise respecting it.

The testimony of the officers reflected that on May 2, 1971, in connection with a narcotic investigation, they observed Jefferson, Edward Barnett, and petitioner drive in two vehicles to the home of Avell Williams in Los Angeles where they were met by Williams, and Grady McLeod, the latter arriving in another vehicle; that in Williams' driveway they observed these men working with a power tool inside the left front door of Jefferson's car, appearing to be drilling and cutting in that area; that at one point petitioner and Barnett were followed to a store where they were observed to purchase a saw blade and then return to Williams' house where they continued work on Jefferson's car; that afterward the several men were seen to leave the location and later the same day Jefferson and Barnett to drive in the former's vehicle to Tijuana, Mexico; that

custom's officers were then alerted to the situation and such officers stopped and searched Jefferson's car when it re-entered the United States at the border; and that a compartment cut into the floor on the left front side of the vehicle was then discovered containing concealed packages of heroin and cocaine of substantial street value, which the officers seized. All parties were thereupon arrested (Jefferson and Barnett at the border, and Williams, McLeod and petitioner in Los Angeles), and in the trunk of petitioner's automobile, an electric drill and cutting wheel were found and seized as evidence (R.T. pp. 312-333, 380-388, 429-432, 436-440, 449-450, 475-481).

Kenneth Jefferson, called as a witness by the government, testified that on May 21, 1971 he was offered two hundred dollars by petitioner and McLeod for the use of his car to go to Mexico for the purpose of trying to obtain heroin and cocaine; that to accomplish this he allowed them, together with Barnett, to work on his car at Williams' house, and to cut a concealed compartment in the floor of the vehicle; that later

that day he drove in his car with Barnett and a girlfriend to Tijuana, Mexico where Barnett contacted some people and obtained several packages; and that on re-entering the United States at the border his car was stopped and searched and the packages mentioned seized by custom's officers after being found by them in the concealed compartment (R.T. pp. 229-250, 271-272, 279-284, 286-288, 306-307).

The foregoing, in substance, together with the physical evidence received, thus constituted the government's case against petitioner.

QUESTION RAISED

A single but critical question is presented in the instant case which concerns two correlative areas of the law. These areas are the right of an accused to effective representation of counsel in a criminal action and the claim of the government to avoid revealing the identity of its witnesses prior to trial. The specific question here involved is whether the

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determination of the conflict created by these competing interests in the courts below denied petitioner a fair trial. Equally important to the administration of justice, however, is a resolution of this conflict by this Court in a manner that will avoid future uncertainty and conflict on this subject which otherwise will present continuing problems to the courts and litigants in criminal trials.

DISCUSSION

The importance of counsel to an accused in a criminal case is now fully recognized and firmly established. Indeed, counsel is required (or its waiver must be shown) at all stages of the prosecution, including police custodial interrogation, Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966) and police conducted lineups, United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L.Ed.2d 1149 (1967); Gilbert v. California, 388 U.S. 263, 87 S. Ct. 1951, 18 L.Ed.2d 1178 (1967). The need of counsel at trial, for everyone charged with a serious offense, is amply

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expressed in Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963), and on appeal in Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L.Ed.2d 811 (1963), and to compel a defendant to proceed without counsel is unquestionably reversible error. See, too, in this regard Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006 (1972).

However, the right to counsel under the Sixth Amendment means more than merely having a lawyer appear with the accused during his various proceedings. This Court early recognized that the right of counsel meant effective counsel and that this in turn meant counsel who had opportunity to investigate the case and prepare a defense. Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L.Ed. 158 (1932). Pro forma representation fails adequately to satisfy the Constitution and has forcefully been repudiated by this Court.

But can it be said that an attorney can effectively prepare a defense and provide more than mere pro forma representation who is deliberately denied access to the evidence intended to be elicited by the

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government? If an attorney is refused all information respecting the extent of the prosecution case, of what value is his representation to the accused? An attorney simply cannot be kept in the dark before trial respecting the prosecution evidence and be expected to provide effective representation for his client during trial. The entire meaning of the Sixth Amendment right to counsel becomes vitiated in such circumstance and the disadvantage to the accused becomes manifest.

Yet, the government contends that it may summarily refuse to disclose the identity of its witnesses, and this position has been affirmed by the Ninth Circuit Court of Appeals, Rosenzweig v. United States, 412 F.2d 844 (1969). This view, however, conflicts with the basic need of a defendant in a criminal case to prepare his defense and precludes effective representation by counsel cognizant of the evidence and issues. Moreover, it is a view in direct conflict with this Court's determination in the case of Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L.Ed.2d 446 (1970) where consideration was

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given to the subject of a state alibi statute. In Williams this Court expressed itself thusly:

> "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system . . . [for a rule] which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the state ample opportunity to investigate certain facts crucial to the determination of guilt or innocence."
>
> 399 U.S. at p. 82,
> 90 S. Ct. at p. 1896.

The government, however, would deny this right of investigation where its witnesses are concerned and would thereby prevent defense counsel the opportunity for adequate and effective defense preparation. Concededly there may be times where sufficient reason for witness concealment may exist, but absent a showing in this regard

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nothing commends the government's playing its cards close to its vest and treating a criminal trial as a poker game. Furthermore, in the instant case there was even a misleading of the defense by the government, for in response to the motion for a bill of particulars by the defendants, the government proferred the police report respecting the case, thus leading the defense to believe the prosecution was to be circumstantially based when in fact, through use of the testimony of a co-indictee, the principal inculpatory evidence was of a direct character.

Manifestly, then, the nature of the defense preparation in the case at bar, geared initially to a circumstantial evidence prosecution, was totally deficient to confront the direct inculpation by an accomplice. The addition of the accomplice to the prosecution armory of evidence altered not only the character of the government's case but as well that of any intended defense. No longer could an effective defense on petitioner's behalf be predicated on arguing the inadequacy of the officers' observations to support a verdict of his

knowing participation in a narcotics smuggling operation because he assisted in certain alteration work on a car, which could well have served various alternative purposes. Rather, on sudden notice on the very day of trial, petitioner's defense had to be oriented to impeaching the accomplice's credibility, a matter which certainly, with adequate time and preparation, would have borne fruitful exploration. But taken by surprise on such a critical matter, petitioner's defense was severely handicapped in this respect, and this notwithstanding the questionable veracity of the accomplice who, of course, hoped to gain much on his own behalf as a government witness (R.T. pp. 261-262, 276). In such a circumstance it cannot be seriously contended that petitioner's counsel was able to provide him effective representation within the mandate of this Court's decisions.

Petitioner sought the day prior to trial to substitute privately retained counsel for his previous court appointed counsel. This, of court, is not a disparagement of appointed counsel, for as the court in McGill v. United States, 348 F.2d 791

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(C.A.D.C. 1965), observed:

> "We presume that in ordinary circumstances an accused who finds that funds have become available may, for reasons sufficient unto him, conclude that he prefers to have his own paid counsel, without necessarily claiming that appointed counsel is inadequate."
>
> 348 F.2d at p. 795.

Nor, it is acknowledged, was the trial court's then denial of a continuance to effectuate such substitution error under the circumstances, for it is recognized that a defendant's exercise of his right to private counsel may not be permitted to delay trial of his action or otherwise disrupt the orderly process of the court. McGill v. United States, supra; United States v. Grow, 394 F.2d 182 (4th Cir. 1968).

However, when on the day of trial the government unleashed its sudden surprise of a witness completely unanticipated by the defense, which the very day before it again avoided revealing, and which changed

entirely the completion of the case, no undue delay or disruption in the process of the court would have been occasioned by a continuance to allow defense counsel reasonable time for preparation concerning this new development. Indeed, a reasonable continuance under these circumstances would appear requisite to counsel providing constitutionally adequate and effective representation, whether such counsel was previously court appointed or privately retained and substituted, for the important consideration in such a situation is, and must be, the fairness of the trial and not merely its timeliness. In this connection, the language of this Court in Powell v. Alabama, supra, bears repeating:

> "It is true that great and inexcusable delay in the enforcement of our criminal law is one of the great evils of our time. Continuances are frequently granted for unnecessarily long periods of time, and delays incident to the disposition of motions for new trial and hearings upon appeal have come in many cases to be a distinct reproach

to the administration of justice. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob."

287 U.S. at p. 59.

The instant case, of course, differs significantly from the Scottsboro cases in many regards, but underlying both is a common concept that effective representation cannot be separated from adequate time for investigation and preparation. This is not to suggest that a defendant is entitled to a trial continuance each time he is surprised by the government's presentation of evidence. But where the government deliberately withholds vital information respecting its principal witness whose testimony will change the entire

character of the case and critically affect the defense, and where the defense has diligently sought prior to trial to obtain this information, then due regard for justice requires an appropriate trial continuance so that the defendant will "have sufficient time to advise with counsel", a guarantee of trial fairness which otherwise would be rendered nugatory.

In Williams v. Florida, supra, this Court remarked:

> "Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate."
>
> 399 U.S. at p. 81;
> 90 S. Ct. at p. 1896.

Does it not equally follow that:

> "Given the ease with which a charge can be fabricated, the defendant's interest in protecting himself against an eleventh-hour claim is both obvious and legitimate."

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Must not, therefore, similar conclusions be drawn and like results obtain in each such situation? Can the government be permitted to conceal its case to the day of trial and then spring it on an unsuspecting defendant, whose counsel, through no fault of his own, is unprepared to meet such case? Can it be maintained that such proceeding results in a fair trial? To deny a reasonable trial continuance in this instance, it is submitted, would not constitute "proceeding promptly in the calm spirit of regulated justice". Rather, in such a situation, a legitimate need for further trial preparation arises, and a defendant should not be compelled to proceed to trial in the absence of such preparation. Otherwise the effectiveness of his counsel becomes seriously impeded and reduced even to a pro forma representation. To ignore this reality of the practice of law serves to render the trial itself unfair and constitutes fundamental error in the premises.

This very result, it is urged, transpired in the case at bar. It appears evident that the government here recognized

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weaknesses in its evidence against petitioner and the other parties who were not arrested at the border and accordingly sought to buttress their prosecution by use of the co-indictee Jefferson's testimony against them. That this accomplice was a less than reliable person can hardly be denied; and it is clear why the government would persist in refusing to make a pretrial disclosure of its witnesses to the defense since to do so would allow opportunity to prepare for the evidence thus to be adduced. But as this Court has stated, the trial of a criminal action is not a poker game. The prosecution should never be afraid of penetrating cross-examination of its witnesses in a search for the truth and should not seek to deny defendants the opportunity of adequate preparation in this regard. Such denial does not comport with constitutional mandates of due process of law generally and particularly is violative of the right to effective representation by counsel under the Sixth Amendment. A trial so held must not be sustained, and a resultant conviction must be reversed. Equally important in this regard, standards of trial

procedure for the future now require establishment so recurrence of the instant situation does not become the standard practice in the prosecution of criminal cases. For this reason, therefore, and to redress the error occasioned in the proceedings below, a hearing should be granted herein.

APPLICATION

It is respectfully requested, on the basis of the argument presented and the authorities hereinabove cited, that the within petition for writ of certiorari be granted and the matter set for hearing on the Honorable Court's docket.

Respectfully submitted,
HOWARD E. BECKLER
Attorney for Petitioner

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOHN H. YOUNG, *Defendant-Appellant.*	No. 72-1652
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. GRADY ROGER MCLEOD, *Defendant-Appellant.*	No. 72-1619
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. AVELL C. WILLIAMS, *Defendant-Appellant.*	No. 72-1620

[December 6, 1972]

Appeal from the United States District Court
for the Southern District of California

Before: ELY and TRASK, Circuit Judges, and
TALBOT SMITH, District Judge*

PER CURIAM:

Appellants were tried by a jury and convicted on four counts involving conspiracy and smuggling of heroin and cocaine in

*Honorable Talbot Smith, Senior United States District Judge, for the Eastern District of Michigan, sitting by designation.

violation of 21 U.S.C. §§ 841(a)(1), 846, 952, 960 and 963. We affirm.

Appellants McLeod and Williams contend the evidence was insufficient to support the convictions. In viewing the evidence in the light most favorable to the government, we cannot say that it was insufficient. *See Glasser v. United States*, 315 U.S. 60 (1942). McLeod was present when appellant Young offered to pay a co-conspirator Jefferson $200 to "make a run." Jefferson agreed. Thereafter, McLeod participated in helping to construct the "stash" compartment in the load car, providing the others with an electric saw from his own car. Williams claims to have been an innocent bystander who permitted his friends to work on their car in his driveway. Evidence was presented by the government showing that Williams had more than a casual acquaintance with the co-conspirators; that Williams' house was the agreed meeting place where the "stash" compartment was constructed; that Williams provided the others with a drill and stood close by talking with the others while part of the work on the car was being done; and that a call was made from the Williams' residence to Tijuana on the afternoon of the smuggling venture. On the basis of this evidence, the jury had sufficient support for a finding of guilt.

A second point raised by Williams claims error in admitting telephone records into evidence. Direct proof of his identity as the caller is not required. The circumstantial evidence connecting him with the calls was adequate foundation for admission of the telephone records against him. *United States v. Estrada*, 441 F.2d 873, 878 (9th Cir. 1971); *Carbo v. United States*, 314 F.2d 718, 743 (9th Cir. 1963), *cert. denied, sub nom. Palermo v. United States*, 377 U.S. 953 (1964).

Appellants claim they should have been provided a list of government witnesses prior to the day of the trial. The government, however, is not required to disclose the names of its witnesses. *United States v. Glass*, 421 F.2d 832 (9th Cir. 1969); *Rosenzweig v. United States*, 412 F.2d 844 (9th Cir. 1969).

Motions for a continuance are within the sound discretion of the trial judge. *United States v. Beaty*, No. 71-2852 (9th Cir. Aug. 11, 1972) (motion for a continuance to substitute counsel); *United States v. Harris*, 436 F.2d 775 (9th Cir. 1970) (motion

for a continuance to obtain witnesses); *United States v. Wheeler*, 434 F.2d 1195 (9th Cir. 1970) (motion for a continuance based on a lack of preparation). This court will not disturb the trial judge's denial of the motion for a continuance without a clear showing of abuse which does not appear here.

Finally, the challenged uncalled-for statements of the testifying government agents must be considered against the context of the entire trial record.[1] *Schoepflin v. United States*, 391 F.2d 390, 395 (9th Cir.), *cert. denied* 393 U.S. 865 (1968). Under that test the remarks cannot have had a substantial influence on the jury verdict in this case. The trial court's denial of motions for mistrial was not reversible error.

The judgment is affirmed.

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[1]Asked what his duties were, Officer Hayes responded, "I investigate people who are in the business of selling dope." Officer Tusan, describing his surveillance, stated that he verified the residences of the defendants and then stated, "I also verified two other associates of the original names of the alleged peddlers."

The latter portion of the answer of Tusan was stricken upon motion and the jury was admonished to disregard it. There was no such motion made as to the statement of Officer Hayes.

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